



Mechanism for International Criminal Tribunals

Case No. MICT-13-37-R.1  
Date: 16 November 2015  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Theodor Meron, Presiding  
Judge Burton Hall  
Judge Solomy Balungi Bossa  
Judge Graciela Susana Gatti Santana  
Judge Ivo Nelson de Caires Batista Rosa

**Registrar:** Mr. John Hocking

**Decision of:** 16 November 2015

**PROSECUTOR**

v.

**FERDINAND NAHIMANA**

***PUBLIC***

**DECISION ON NAHIMANA'S REQUEST FOR REVIEW**

**The Office of the Prosecutor:**

Mr. Hassan Bubacar Jallow  
Mr. Richard Karegyesa  
Mr. Cheickh Bangoura

**Counsel for Ferdinand Nahimana:**

Mr. Jean-Marie Biju-Duval  
Ms. Diana Ellis, QC  
Ms. Joanna Evans

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A handwritten signature in black ink, appearing to be 'Ferdinand Nahimana', written over a white background within a black rectangular box.

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively) is seised of a request for review filed on 3 June 2015 by Ferdinand Nahimana.<sup>1</sup> The Prosecution filed a response on 14 July 2015.<sup>2</sup> Nahimana filed a reply on 23 July 2015.<sup>3</sup>

## I. BACKGROUND

2. Nahimana was born on 15 June 1950 in Gatonde commune, Ruhengeri prefecture, Rwanda.<sup>4</sup> In 1990, he was appointed director of the Rwandan Office of Information and remained in that post until 1992 when, together with others, he set up a Steering Committee to establish a company known as *Radio télévision libre des mille collines* (“RTLM”), S.A.<sup>5</sup> Nahimana was a member of the Steering Committee, which functioned, in effect, as a board of directors for the RTLM.<sup>6</sup>

3. In its Judgement of 28 November 2007, the Appeals Chamber of the International Criminal Tribunal for Rwanda (“ICTR”) upheld Nahimana’s convictions, pursuant to Article 6(3) of the ICTR Statute, for direct and public incitement to commit genocide and, by majority, persecution as a crime against humanity with respect to RTLM broadcasts after 6 April 1994.<sup>7</sup> The ICTR Appeals Chamber affirmed the findings of ICTR Trial Chamber I (“Trial Chamber”) that Nahimana, as one of the individuals who established the RTLM, had effective control over RTLM staff, knew or had reason to know that his RTLM subordinates were preparing to broadcast, or had already broadcast, speeches inciting the killing of Tutsis, and had failed to take the necessary and reasonable measures to prevent or punish the direct and public incitement to murder Tutsis and the acts of persecution and instigation to persecution committed by RTLM staff after 6 April 1994.<sup>8</sup> The ICTR Appeals Chamber, by majority,<sup>9</sup> set aside Nahimana’s convictions, pursuant to Article 6(1) of the ICTR Statute, for conspiracy to commit genocide, genocide, direct and public incitement to commit

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<sup>1</sup> *Requête en révision*, 3 June 2015 (“Request”). An English translation was filed on 3 July 2015. See also Order Assigning Judges to a Case Before the Appeals Chamber, 8 September 2015.

<sup>2</sup> Prosecution Response to *Requête en révision*, 14 July 2015 (“Response”).

<sup>3</sup> *Mémoire en Réplique*, 23 July 2015 (“Reply”). An English translation was filed on 14 August 2015.

<sup>4</sup> *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 (“Appeal Judgement”), para. 2, referring to *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 (“Trial Judgement”), para. 5.

<sup>5</sup> Appeal Judgement, para. 2, referring to Trial Judgement, para. 5.

<sup>6</sup> See Appeal Judgement, paras. 794, 804. See also Appeal Judgement, para. 625.

<sup>7</sup> Appeal Judgement, paras. 996, 1051, p. 345.

<sup>8</sup> Appeal Judgement, paras. 2, 834, 841, 856-857, 995-996, 1051, p. 345; Trial Judgement, paras. 5, 1033, 1081.

<sup>9</sup> See Partly Dissenting Opinion of Judge Shahabuddeen; Partly Dissenting Opinion of Judge Meron.

genocide and extermination and persecution as crimes against humanity, and reduced his sentence from life to 30 years of imprisonment.<sup>10</sup>

4. In his Request, Nahimana submits that the Appeal Judgement should be reviewed in light of new evidence that was unavailable during the original proceedings.<sup>11</sup> The proposed evidence consists of four diplomatic telegrams, sent by a French diplomat, Ambassador Yannick Gérard, describing meetings with Rwandan interim government officials, including Nahimana, in July 1994.<sup>12</sup>

5. The Prosecution responds that the Request should be dismissed in its entirety since Nahimana fails to meet any of the criteria for review under Article 24 of the Mechanism's Statute ("Statute") and Rule 146 of the Mechanism's Rules of Procedure and Evidence ("Rules").<sup>13</sup>

## II. APPLICABLE LAW

6. Review proceedings are governed by Article 24 of the Statute and Rules 146, 147, and 148 of the Rules. A request to have the Appeals Chamber review a final judgment will be granted if the moving party shows that the following cumulative conditions are met: (i) there is a new fact; (ii) the new fact was not known to the moving party at the time of the trial or appeal proceedings before the ICTR, the International Criminal Tribunal for the former Yugoslavia ("ICTY"), or the Mechanism; (iii) the new fact could not have been discovered through the exercise of due diligence; and (iv) the new fact could have been a decisive factor in reaching the original decision.<sup>14</sup>

7. The jurisprudence of the ICTY and ICTR has established that review of a final judgment is an exceptional procedure and not an additional opportunity for a party to re-litigate arguments that failed on trial or on appeal.<sup>15</sup> A "new fact", within the meaning of the relevant provisions, consists of "new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings".<sup>16</sup> The requirement that the new fact was not in issue during the proceedings means

<sup>10</sup> Appeal Judgement, paras. 1051-1052, p. 345.

<sup>11</sup> Request, paras. 14, 17, 52.

<sup>12</sup> Request, Annex 5.

<sup>13</sup> Response, paras. 3, 24.

<sup>14</sup> *Eliézer Niyitegeka v. The Prosecutor*, Case No. MICT-12-16-R, Decision on Niyitegeka's Request for Review and Assignment of Counsel, 13 July 2015 ("*Niyitegeka* Decision of 13 July 2015"), para. 6; *Prosecutor v. Sreten Lukić*, Case No. MICT-14-67-R.1, Decision on Sreten Lukić's Application for Review, 8 July 2015 ("*S. Lukić* Decision of 8 July 2015"), para. 5.

<sup>15</sup> *Niyitegeka* Decision of 13 July 2015, para. 8; *S. Lukić* Decision of 8 July 2015, para. 6.

<sup>16</sup> *Niyitegeka* Decision of 13 July 2015, para. 7; *S. Lukić* Decision of 8 July 2015, para. 6, citing *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-R, Decision on Request for Review, 29 May 2013 ("*Kajelijeli* Review

that it must not have been among the factors that the deciding body could have taken into account in reaching its verdict.<sup>17</sup> It is irrelevant whether the new fact already existed before the original proceedings or during such proceedings. What matters is “whether the deciding body and the moving party knew about the fact or not” in reaching its decision.<sup>18</sup>

8. In “wholly exceptional circumstances”, review may still be permitted even though the “new fact” was known to the moving party or was discoverable by it through the exercise of due diligence if a Chamber is presented with “a new fact that is of such strength that it *would* affect the verdict”<sup>19</sup> and determines that “review of its judgement is necessary because the impact of the new fact on the decision is such that to ignore it would lead to a miscarriage of justice”.<sup>20</sup>

### III. DISCUSSION

9. The ICTR Appeals Chamber confirmed the Trial Chamber’s findings that Nahimana had effective control over the RTLM both prior to 6 April 1994<sup>21</sup> and after that date.<sup>22</sup> In reaching its finding on Nahimana’s continuous authority over the RTLM, the Trial Chamber considered *inter alia*, his intervention in late June or early July 1994 to stop the broadcasting of RTLM attacks on the United Nations Assistance Mission for Rwanda (“UNAMIR”) and its commander General Roméo Dallaire.<sup>23</sup> In this regard, the Trial Chamber relied on a report by expert witness Alison Des Forges stating that: (i) in late June 1994 Ambassador Gérard told Nahimana that the RTLM broadcasts were deplorable and must stop, particularly those threatening General Dallaire and UNAMIR; (ii) Nahimana promised to intervene with the RTLM journalists; and (iii) Ambassador Gérard subsequently reported that the RTLM attacks on General Dallaire and UNAMIR halted promptly thereafter.<sup>24</sup> According to Witness Des Forges, the source of this information was her telephone interview on 28 February 2000 with a French Ministry of Foreign Affairs official, Jean-

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Decision”), para. 7; *Mladen Naletilić v. Prosecutor*, Case No IT-98-34-R, Decision on Mladen Naletilić’s Request for Review, 19 March 2009, para. 10.

<sup>17</sup> *Niyitegeka* Decision of 13 July 2015, para. 7.

<sup>18</sup> *Niyitegeka* Decision of 13 July 2015, para. 7, citing *Kajelijeli* Review Decision, para. 8; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Request for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006 (“*Rutaganda* Review Decision”), para. 9; *S. Lukić* Decision of 8 July 2015, para. 6, citing *Prosecutor v. Veselin Šljivančanin*, Case No IT-95-13/1-R.1, Decision with Respect to Veselin Šljivančanin’s Application for Review, 14 July 2010 (“*Šljivančanin* Review Decision”), p. 2.

<sup>19</sup> *S. Lukić* Decision of 8 July 2015, para. 7, citing *Šljivančanin* Review Decision, pp. 2-3.

<sup>20</sup> *Niyitegeka* Decision of 13 July 2015, para. 6; *S. Lukić* Decision of 8 July 2015, para. 7, citing *Šljivančanin* Review Decision, p. 3.

<sup>21</sup> Appeal Judgement, para. 822.

<sup>22</sup> Appeal Judgement, para. 834.

<sup>23</sup> Trial Judgement, paras. 568, 972.

Christophe Belliard, who read to her the relevant information from a French diplomatic telegram.<sup>25</sup> Witness Des Forges testified that Belliard was with Ambassador Gérard when Gérard met with Nahimana.<sup>26</sup> The Trial Chamber's findings on the reliability of Witness Des Forges's evidence and conclusion that it was Nahimana's intervention that put an end to the RTLM attacks on General Dallaire and UNAMIR were upheld on appeal.<sup>27</sup>

10. In his Request, Nahimana relies on four diplomatic telegrams dated 2 July 1994, 3 July 1994, 9 July 1994, and 25 July 1994, all sent by Ambassador Gérard in the context of the French-led *Operation Turquoise* in Rwanda.<sup>28</sup> In the telegram of 2 July 1994, Ambassador Gérard describes a meeting with Jérôme Bicomumpaka and Nahimana, the "founder" of RTLM.<sup>29</sup> During the meeting, Ambassador Gérard told the Rwandan officials that he deplored the "intolerable nature of the broadcasts by [RTLM] and requested that the calls to murder and criticism of General Dallaire" by the RTLM cease immediately.<sup>30</sup> At the meeting, Nahimana promised to intervene to cease the RTLM attacks against the General.<sup>31</sup> According to the telegram dated 3 July 1994, Ambassador Gérard held another meeting with Rwandan interim government officials, during which Nahimana reiterated his assurances "regarding putting a stop to the attacks against UNAMIR".<sup>32</sup> According to the telegram of 9 July 1994, Ambassador Gérard met with a delegation from the Rwandan interim government, but not with Nahimana.<sup>33</sup> The telegram of 25 July 1994 contains a report from Ambassador Gérard of his mission to Goma from 30 June to 25 July 1994 and indicates that he

<sup>24</sup> Trial Judgement, paras. 543, 563.

<sup>25</sup> Trial Judgement, paras. 543, 563.

<sup>26</sup> Trial Judgement, para. 543, *referring to* Prosecution Exhibit 158(A), p. 53 ("Gerard did not mince his words in deploring the character of RTLM broadcasts and said they must stop, particularly those threatening General Dallaire and UNAMIR. Nahimana promised to intervene with the journalists and asked the French in return to guarantee Dallaire's neutrality. Gerard replied that he had no doubts about Dallaire's neutrality. Gerard reported subsequently that the RTLM attacks on Dallaire and UNAMIR halted promptly after this interview."); *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Witness Des Forges, T. 23 May 2002, pp. 211-213 ("I asked him if he could tell me anything about his understanding of Mr. Nahimana at that time. We agreed to speak by telephone, which we were not able to do until some time subsequent, and at that time he read to me a diplomatic telegram the contents of which are summarised in my expert witness report. He said that in a conversation with Mr. Nahimana [Mr. Gérard] had complained vigorously about a recent RTLM broadcast which had specifically targeted General Dallaire [...] Mr. Gérard complained to Mr. Nahimana about these broadcasts, and they ceased within a day or two. Mr. Nahimana returned a second time. [...] Mr. Gerard himself refused to meet with Mr. Nahimana and, instead [...] Mr. Belliard. [...] met with Mr. Nahimana [...] On one of those occasions they made a specific request that RTLM cease broadcasting threats against the UNAMIR commander and, according to the French diplomatic sources, these complaints then stopped.").

<sup>27</sup> Appeal Judgement, paras. 831-834.

<sup>28</sup> Request, Annex 5.

<sup>29</sup> Request, Annex 5, RP. 12/476bis.

<sup>30</sup> Request, Annex 5, RP. 11/476bis, para. 2.

<sup>31</sup> Request, Annex 5, RP. 11/476bis, para. 2.

<sup>32</sup> Request, Annex 5, RP. 8-7/476bis, para. 4.

<sup>33</sup> Request, Annex 5, R.P. 7-6/476bis. Even though Ambassador Gérard did not meet with Nahimana, it follows from the telegram of 9 July 1994 that Nahimana accompanied the delegation.

“requested [...] that the authorities put a stop to the propaganda by [RTLM] and exert their influence, in the proper sense, on the militia”.<sup>34</sup> Ambassador Gérard concludes in the telegram of 25 July 1994, however, that his “interlocutors made commitments but they were not credible and they were not respected”.<sup>35</sup> Ambassador Gérard adds that he “collected overwhelming and credible evidence on the personal conduct of some of these interlocutors over the previous months that convinced [him] that they were amongst those chiefly responsible for the genocide, not least through their influence over [RTLM]”.<sup>36</sup> The telegram of 25 July 1994 also mentions, *inter alia*, the “capture of Kigali” on 4 July 1994 by the Rwandan Patriotic Front (“RPF”).<sup>37</sup>

11. Nahimana contends that the telegrams: (i) show that he did not intervene with the RTLM journalists;<sup>38</sup> and (ii) suggest another reasonable explanation as to why the broadcasts threatening General Dallaire and UNAMIR ceased, namely that RTLM journalists had to flee and cease broadcasts when Kigali was captured by the RPF on 4 July 1994.<sup>39</sup> Nahimana argues that this information constitutes new facts which could have been a decisive factor in the original decision as they undermine the finding that he had effective control over the RTLM.<sup>40</sup> Nahimana further submits that the fact that the telegrams were only recently discovered is not due to lack of due diligence on his part.<sup>41</sup> In this regard, he argues that he unsuccessfully requested disclosure of the telegrams from the Prosecution,<sup>42</sup> and relies on a Trial Chamber’s decision on Prosecution’s request to present rebuttal evidence, in which the Trial Chamber stated that Nahimana’s meetings with *Operation Turquoise* officials were not relevant to the determination of his responsibility.<sup>43</sup> Nahimana submits that he obtained the telegrams only recently after a series of communications with the French authorities.<sup>44</sup> Finally, Nahimana argues that Witness Des Forges misrepresented the

<sup>34</sup> Request, Annex 5, RP. 5-4/476bis, para. 1.

<sup>35</sup> Request, Annex 5, RP. 4/476bis, para. 2.

<sup>36</sup> Request, Annex 5, RP. 3/476bis, para. 2.

<sup>37</sup> Request, Annex 5, RP. 3/476bis, paras. 3-4.

<sup>38</sup> Request, paras. 15, 39-41, 48. See Request, Annex 5, R.P. 4/476bis, para. 2; Reply, paras. 3-4.

<sup>39</sup> Request, paras. 32-36.

<sup>40</sup> Request, paras. 15-17, 36-38, 42, 51.

<sup>41</sup> Request, para. 30.

<sup>42</sup> Request, para. 19, referring to Request, Annex 6.

<sup>43</sup> Request, para. 11, referring to *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Decision on the Prosecutor’s Application for Rebuttal Witnesses, 9 May 2003 (“*Nahimana* Decision of 9 May 2003”); *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Decision of 9 May 2003 on the Prosecutor’s Application for Rebuttal Witnesses as Corrected According to the Order of 13 May 2003 (“*Nahimana* Decision of 13 May 2003”), para. 62.

<sup>44</sup> Request, paras. 13-14, 22-30. See Request, Annexes 1-4; Reply, paras. 2, 7.

content of the telegrams, which undermine the reliability of her testimony, which was the sole basis for finding that Nahimana effectively and efficiently intervened with the RTLM.<sup>45</sup>

12. In response, the Prosecution submits that the Request is an impermissible attempt by Nahimana to re-litigate the issue of his effective control over the RTLM and challenge Witness Des Forges's evidence.<sup>46</sup> The Prosecution further argues that the telegrams do not constitute new facts as their content was in issue at trial, and are, instead, additional evidence of facts unsuccessfully challenged by Nahimana during the original proceedings.<sup>47</sup> While the Prosecution concedes that the telegrams were made available only in June 2014, it notes that the existence and content of the telegrams were known to Nahimana at the time of his trial and that he failed to challenge this aspect of Witness Des Forges's evidence in the original proceedings.<sup>48</sup> In addition, the Prosecution argues that the telegrams could not have been a decisive factor in reaching Nahimana's conviction which rested on ample evidence demonstrating his effective control over the RTLM.<sup>49</sup> As to Nahimana's argument that the RTLM had to cease broadcasts because of Kigali's capture by the RPF on 4 July 1994, the Prosecution responds that this argument was not advanced at trial or on appeal and is not supported by any evidence on the record.<sup>50</sup>

1. Nahimana's intervention to halt RTLM attacks on UNAMIR and General Dallaire

13. The Appeals Chamber recalls that Witness Des Forges's hearsay evidence about Nahimana's intervention with the RTLM was based, in part, on her conversation with Belliard who conveyed information to her from one of the French diplomatic telegrams which have been submitted in connection with the Request.<sup>51</sup> In this regard, the Appeals Chamber notes that none of the French diplomatic telegrams presented by Nahimana states that the attacks on UNAMIR and General Dallaire ceased shortly after Nahimana promised to intervene with the RTLM journalists.<sup>52</sup>

<sup>45</sup> Request, paras. 49-50; Reply, para. 5.

<sup>46</sup> Response, paras. 3(a), 11-12, 16, 21.

<sup>47</sup> Response, paras. 3(b), 18-20.

<sup>48</sup> Response, paras. 11-12, 19.

<sup>49</sup> Response, paras. 3(c), 21-23.

<sup>50</sup> Response, para. 15, *referring to* Trial Judgement, para. 1017.

<sup>51</sup> Prosecution Exhibit 158(A), p. 53, n. 19. The Prosecution has not suggested that there are any other existing French diplomatic telegrams that could have formed the basis of the information conveyed by Belliard. The Appeals Chamber also observes that Witness Des Forges indicated that Belliard was himself present in meetings between Nahimana and Ambassador Gérard. *See* Trial Judgement, para. 563; Appeal Judgement, para. 831. In addition, in her report, Witness Des Forges also referred to a press-account by Anne Chaon (*See* Prosecution Exhibit 158(A), p. 53, n. 19)..

<sup>52</sup> The Appeals Chamber notes that, in his letter to the French authorities, Nahimana requested "the disclosure of any diplomatic telegram(s) that may have been sent between 1 June 1994 and 31 December 1994, that refer to a conversation between Mr Yannick G[érard] and/or Mr Jean-Christophe B[elliard] with Mr Ferdinand N[ahimana] during which an intervention by the latter with Radio *RTLM* [...] was mentioned" (Request, Annex 3, RP. 20/476bis,

Furthermore, the telegram of 25 July 1994 states that the undertakings made by the authorities who met with Ambassador Gérard to stop the RTLM propaganda and exert their influence on the militia in a proper sense, with a view therefore to end the on-going violence, were not credible and were not respected.<sup>53</sup> Accordingly, there appears to be no factual basis for Witness Des Forges's testimony that Nahimana in fact intervened with the RTLM's staff at the behest of Ambassador Gérard and that his intervention was successful. Neither the Trial Chamber nor the ICTR Appeals Chamber was aware that this particular aspect of Witness Des Forges's testimony – which was relied on by the Trial Chamber, in part, to making its findings on Nahimana's authority over the RTLM staff – lacked a factual basis. Thus, the information contained in the telegrams, namely that Ambassador Gérard did not believe that his interlocutors were credible and respected their commitments, constitutes a new fact.

14. The Appeals Chamber further accepts that Nahimana was not aware that the content of the diplomatic telegrams did not support the entirety of Witness Des Forges' testimony regarding Nahimana's intervention, during the original proceedings and that he only became aware when the telegrams were disclosed to him by the French authorities in June 2014. Nonetheless, the Appeals Chamber is not satisfied that Nahimana acted with the requisite diligence in discovering and bringing these telegrams forward. First, Nahimana, who was aware of the existence of these telegrams at the time of his trial,<sup>54</sup> only requested them from the French Ministry of Foreign Affairs on 13 January 2014 approximately seven years after the proceedings against him were concluded.<sup>55</sup> The Appeals Chamber acknowledges that the Trial Chamber gave some indication at trial that this evidence was not relevant to the case.<sup>56</sup> This, however, cannot excuse Nahimana's failure to exercise due diligence to obtain this material during the course of the appeal and to request its admission as additional evidence, in particular since it became clear that the Trial Chamber ultimately relied on Witness Des Forges's evidence in convicting him in the Trial Judgement. Indeed, Nahimana argued on appeal that the Trial Chamber should have considered the direct evidence that formed the basis of Witness Des Forges's testimony and erred in not doing so.<sup>57</sup> Nahimana had the burden to exhaust all measures afforded by the Statute and Rules to obtain the

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emphasis added). In response to Nahimana's request, the French Ministry of Foreign Affairs indicated that a search had uncovered four telegrams (Request, Annex 5, RP. 13/476bis).

<sup>53</sup> Request, Annex 5, RP. 4/476bis, para. 2.

<sup>54</sup> The telegrams were referred to in Witness Des Forges's testimony and expert report and he requested disclosure of a diplomatic telegram of 28 February 2000 on 15 May 2002. See Request, Annex 6.

<sup>55</sup> Request, para. 23. See also Reply, para. 19.

<sup>56</sup> *Nahimana* Decision of 9 May 2003, para. 62. See *supra* para. 11; Request, para. 11.

<sup>57</sup> *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Appeal Brief (Revised), 21 February 2006 ("Nahimana Appeal Brief"), para. 496.



presentation of this evidence, even during the appeals proceedings.<sup>58</sup> Nahimana has not demonstrated that he had done so. Neither has Nahimana demonstrated that the Prosecution violated its disclosure obligations.<sup>59</sup>

15. Having found that Nahimana has failed to exercise due diligence in discovering the new fact, the Appeals Chamber turns to examine whether this case presents wholly exceptional circumstances warranting review.<sup>60</sup> In doing so, the Appeals Chamber is mindful that, during the original proceedings, Nahimana was found to have exercised effective control over the RTLM from its establishment through the conclusion of the relevant events in 1994.<sup>61</sup>

16. In relation to the period before 6 April 1994, the ICTR Appeals Chamber confirmed the Trial Chamber's finding on Nahimana's effective control on the basis of his: role in the creation of the RTLM; membership of the RTLM Steering Committee; position as Chairman of the RTLM Technical and Programme Committee; attendance at meetings at the Ministry of Information; control of the RTLM finances; directorship of the RTLM; power to give orders and role in determining the content of the RTLM broadcasts.<sup>62</sup> Having upheld the Trial Chamber's finding in relation to Nahimana's effective control over the RTLM prior to 6 April 1994, the ICTR Appeals Chamber held that the Trial Chamber could reasonably conclude that Nahimana continued to possess the power to intervene at the RTLM after that date, "unless there was a reasonable doubt as to whether such powers continued to exist".<sup>63</sup> In examining the latter question, the ICTR Appeals Chamber upheld the Trial Chamber's finding that Nahimana maintained a connection with the RTLM after 6 April 1994,<sup>64</sup> and that he intervened to halt the RTLM attacks on UNAMIR and General Dallaire.<sup>65</sup> Thus the pertinent question before the Appeals Chamber is whether the new fact that the diplomatic telegrams do not support Witness Des Forges' evidence that the threats against UNAMIR and General Dallaire ceased shortly after due to Nahimana's intervention is of such strength that it *would* affect the verdict and ignoring it would lead to a miscarriage of justice.<sup>66</sup>

17. Having reviewed the content of the diplomatic telegrams, the Appeals Chamber is not satisfied that they would undermine the finding that Nahimana continued to possess the authority to

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<sup>58</sup> See *Rutaganda Review Decision*, para. 19.

<sup>59</sup> See *Request*, para. 19; *Reply*, para. 2.

<sup>60</sup> See *supra* para. 8.

<sup>61</sup> See *Appeal Judgement*, paras. 817, 822, 826-827, 834.

<sup>62</sup> *Appeal Judgement*, paras. 798, 803-817, 822.

<sup>63</sup> *Appeal Judgement*, para. 827.

<sup>64</sup> *Appeal Judgement*, para. 828.

<sup>65</sup> *Appeal Judgement*, paras. 827-828, 833.

<sup>66</sup> See *supra* para. 8.

intervene with the RTLM after 6 April 1994. The telegrams refer to Nahimana as, *inter alia*, the founder of the RTLM.<sup>67</sup> In addition, the telegrams indicate that Nahimana made commitments regarding the RTLM on two separate occasions: on 2 July 1994 when Nahimana promised Ambassador Gérard to intervene with the RTLM to have the attacks against UNAMIR and General Dallaire cease,<sup>68</sup> and on the following day, when he reiterated his assurances in the presence of, *inter alia*, the President of the Rwandan interim government.<sup>69</sup> The diplomatic telegrams thus clearly indicate that Nahimana made commitments on behalf of the RTLM and represented himself as having the ability to exert authority over the radio station. Therefore, the content of the telegrams supports the findings on Nahimana's continued effective control over the RTLM and material capacity to prevent or punish RTLM journalists for broadcasts of criminal discourse.<sup>70</sup>

18. In addition, the telegram of 25 July 1994, which stated that the interlocutors' commitments were not respected, explained that this was the case because the commitments were not credible. Contrary to Nahimana's arguments, this statement does not suggest that he was not in a position to stop the RTLM propaganda or that there was an interruption in his effective control over RTLM staff. Rather it reinforces the findings reached in the original proceedings that he remained in effective control over the RTLM throughout the relevant period. The Appeals Chamber finds therefore that, in fact, the telegrams only reinforce that Nahimana maintained an active role in the RTLM, made repeated representations on its behalf to foreign officials in the presence of the Rwandan President, and continued to maintain effective control over RTLM staff as found by the Trial and Appeals Chamber.

19. Considering all the above factors, the Appeals Chamber finds that a review of the Appeal Judgement is not necessary because the new fact is not of such strength that it would affect the verdict and ignoring it would not lead to a miscarriage of justice.

<sup>67</sup> Request, Annex 5, RP. 12/476bis, 6/476bis, 4/476bis.

<sup>68</sup> Request, Annex 5, RP. 11/476bis, 8/476bis, 7/476bis.

<sup>69</sup> Request, Annex 5, RP. 8/476bis, 7/476bis.

<sup>70</sup> See *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Judgement, 30 January 2015, para. 1860 (where the ICTY Appeals Chamber recalled that there is no definitive list of indicators of effective control and that the indicators considered will necessarily depend on the case and are a matter of evidence showing that the accused had the power to prevent or punish the alleged perpetrators where appropriate); *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-A, Judgement, 27 January 2014, para. 275 (where the ICTY Appeals Chamber stated that the participation of Đorđević in the negotiation of the October Agreements and his ability to give undertakings on behalf of the Republic of Serbia were correctly considered as indicative of his effective control over the police force); *Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A, Judgement, 14 December 2011, para. 452 (where the ICTR Appeals Chamber held that Bagosora's representation of the Rwandan Armed Forces in meetings with the international community was correctly considered in the context of whether Bagosora had effective control over the armed forces).

## 2. Capture of the RTLM by the RPF forces


20. The Appeals Chamber notes that Nahimana's argument that the RTLM broadcasts ceased on 3 July 1994 on the orders of the military authorities because of the imminent takeover of Kigali by the RPF was considered on appeal.<sup>71</sup> The French diplomatic telegrams provide no further support to Nahimana's contention. Accordingly, Nahimana fails to demonstrate the existence of new information of an evidentiary nature of a fact that was not in issue during the original proceedings.<sup>72</sup> His submissions in this regard are therefore dismissed.

### IV. DISPOSITION

21. For the foregoing reasons, the Appeals Chamber hereby **DISMISSES** the Request in its entirety.

Done in English and French, the English version being authoritative.

Done this 16th day of November 2015,  
At The Hague,  
The Netherlands.

  
Judge Theodor Meron,  
Presiding Judge

[Seal of the Mechanism]



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<sup>71</sup> See Appeal Judgement, para. 797, referring to, *inter alia*, Nahimana Appeal Brief, paras. 497-499.

<sup>72</sup> See *supra* para. 7.